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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 RICKEY TODD MAJOR,

10 Petitioner,

3:99-cv-00237-LRH-RAM

11 vs.

ORDER

12 E.K. McDANIEL, *et al.*,

13 Respondents.
14 _____/

15
16 **Introduction**

17 In this habeas corpus action, the respondents have filed a motion to dismiss
18 (docket #66), arguing that several claims in the amended habeas petition are unexhausted in state
19 court and that several claims have been procedurally defaulted. Petitioner has filed an opposition to
20 the motion to dismiss (docket #69). Respondents have replied (docket #70).

21 The Court will grant the motion to dismiss in part, and deny it in part. The Court will
22 dismiss Grounds 16 and 17(n), as moot; in all other respects, the motion to dismiss will be denied.

23 **Background**

24 The petitioner, Rickey Todd Major, is serving two consecutive sentences of life in
25 prison without the possibility of parole, on convictions of first degree murder with the use of a
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1 deadly weapon. *See* Amended Petition (docket #14), p. 2. The judgment of conviction was entered,
2 in Nevada's Fourth Judicial District Court, on May 1, 1996. Exhibit 207 (judgment).¹ Petitioner's
3 convictions were for the killing of his common law wife, who disappeared on April 16, 1988.

4 Petitioner appealed to the Nevada Supreme Court. Exhibit 208 (notice of appeal);
5 Exhibit 212 (opening brief); Exhibit 216 (reply brief). That appeal was unsuccessful. The Nevada
6 Supreme Court dismissed the appeal on September 3, 1998. Exhibit 233 (order dismissing appeal).

7 While his appeal from the judgment of conviction was pending, on March 20, 1997,
8 petitioner filed, in the state district court, a motion for new trial, contending that he had discovered
9 new evidence regarding a conflict of interest on the part of his trial counsel. Exhibit 218 (motion
10 for new trial). The state district court denied that motion on May 16, 1997. Exhibit 224.

11 Petitioner appealed from the order denying the motion for new trial. Exhibit 225 (notice of appeal);
12 Exhibit 229 (opening brief); Exhibit 231 (reply brief). That appeal was also unsuccessful. The
13 Nevada Supreme Court dismissed the appeal on July 28, 1998. Exhibit 236 (order dismissing
14 appeal); Exhibit 238 (corrected order dismissing appeal).

15 On November 3, 1998, petitioner filed a petition for writ of habeas corpus in the state
16 district court. Exhibit 241 (state-court habeas petition); 251 (amended state-court habeas petition).
17 An evidentiary hearing was held on that petition on December 5, 2003 and January 13, 2004.
18 Exhibits 282, 283 (transcripts of hearing). The petition was dismissed December 20, 2004.
19 Exhibit 302. Petitioner appealed. Exhibit 312 (opening brief). The Nevada Supreme Court affirmed
20 on October 19, 2006. Exhibit 318.

21 During the course of the state habeas proceedings, the state district court, addressing a
22 claim that petitioner had not waived his right to be sentenced by the jury that found him guilty,
23 directed petitioner's counsel to file a motion to correct an illegal sentence. That motion was filed,
24 and it was granted. Exhibit 284 (motion to correct illegal sentence); Exhibit 287 (order granting
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26 ¹ Unless otherwise stated, the exhibits referred to in this order were filed by petitioner, and are
located in the record at docket numbers 17-20, 22-30, and 49-59.

1 motion). A new sentencing was set to be conducted before a jury; however, on the morning that the
2 sentencing-hearing was to commence, petitioner waived the re-sentencing before the jury and
3 stipulated to be sentenced by the court. Exhibit 298 (stipulation); Exhibit 299 (transcript of
4 canvass). Petitioner was again sentenced to two consecutive terms of life in prison without the
5 possibility of parole. Exhibits 300, 304 (transcripts of sentencing hearing). Petitioner appealed
6 regarding the new sentence. Exhibit 310 (opening brief). The Nevada Supreme Court affirmed on
7 July 5, 2006. Exhibit 316.

8 On April 27, 1999, petitioner initiated this federal habeas action, *pro se*. The Court
9 appointed counsel for petitioner (docket #4). With counsel, petitioner filed an amended habeas
10 petition (docket #14) on March 17, 2000.

11 On April 2, 2001, on a motion to dismiss, the Court found several of the claims in the
12 amended habeas petition to be unexhausted in state court (docket #42). The Court gave petitioner
13 the option of either abandoning the unexhausted claims or voluntarily dismissing the action without
14 prejudice in order to return to state court to exhaust the unexhausted claims. The Court denied
15 petitioner's request that this action be stayed, noting that there was pending state litigation that tolled
16 the statute of limitations. Petitioner chose to dismiss this action in order to return to state court
17 (docket #45). Therefore, on December 27, 2001, the case was dismissed without prejudice, without
18 entry of judgment, and subject to reopening (docket #47).

19 On January 30, 2007, the Court entered an order granting a motion by petitioner to
20 reopen the case, and ordering the case reopened (docket #61).

21 On June 28, 2007, respondents filed the motion to dismiss that is now before the
22 Court (docket #66). Petitioner filed an opposition on September 28, 2007 (docket #69), and
23 respondents replied on October 12, 2007 (docket #70).

24 In the motion to dismiss, respondents assert that Grounds 5, 10, 11, 12, 13, 14, 16,
25 and Grounds 17(b), (d), (g), (h), (i), (j), (l), and (n) are still unexhausted in state court, and, in the
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1 alternative, that Grounds 5, 10, 11, 12, 14, and 16 are procedurally barred. Respondents also argue
2 that Ground 16 is moot.

3 Mootness of Claims

4 The parties appear to agree that Ground 16 is moot. *See* Motion to Dismiss, p. 19;
5 Opposition to Motion to Dismiss, p. 2, footnote 2. Also, petitioner concedes that Ground 17(n) is
6 moot. Opposition to Motion to Dismiss, p. 2, footnote 2. Therefore, the Court will dismiss
7 Grounds 16 and 17(n) as moot.

8 Exhaustion

9 A. Exhaustion Standards

10 A federal court may not grant relief on a habeas claim not exhausted in state court. 28
11 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is
12 designed to give state courts the initial opportunity to correct alleged constitutional deprivations. *See*
13 *Picard v. Conner*, 404 U.S. 270, 275 (1971).

14 To exhaust a claim, a petitioner must fairly present that claim to the State's highest
15 court, and must give that court the opportunity to address and resolve it. *See Duncan v. Henry*, 513
16 U.S. 364, 365 (1995)(*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair
17 presentation" requirement is satisfied when the claim has been presented to the highest state court by
18 describing the operative facts and the legal theory upon which the federal claim is based. *See*
19 *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982),
20 *cert. denied*, 463 U.S. 1212 (1983).

21 To fairly present a federal claim to the state court, the petitioner must alert the court
22 to the fact that he asserts a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d
23 1098, 1106 (9th Cir. 1999), *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66.
24 The petitioner must make the federal nature of the claim "explicit either by citing federal law or the
25 decisions of the federal courts." *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended*,
26 247 F.3d 904 (9th Cir. 2001). The mere similarity of claims of state and federal error is insufficient

1 to establish exhaustion. *Hiivala*, 195 F.3d at 1106, *citing Duncan*, 513 U.S. at 366; *see also Lyons*,
 2 232 F.3d at 668-69; *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). “[G]eneral appeals to
 3 broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are
 4 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106, *citing Gray v. Netherland*, 518 U.S.
 5 152, 162-63 (1996); *see also Shumway*, 223 F.3d at 987.

6 B. Ground 5

7 In Ground 5 of his amended petition, petitioner claims:

8 Major’s conviction and sentence are invalid under the federal constitutional
 9 guarantees fo due process, equal protection, trial before an impartial jury and a
 10 reliable sentence because the testimony of the unqualified state expert witness
 11 was not reliable and her conclusions were not based on approved methods that
 could be tested by other experts in her field. U.S. Const. Amends. V, VI, VIII
 & XIV.

12 Amended Petition (docket #14), p. 16. The expert who is the subject of Ground 5 was Dr. Sheilagh
 13 Brooks, an anthropologist who testified for the prosecution. *See id.* at 16-17. In the amended
 14 petition filed March 17, 2000, before his last round of state habeas proceedings, petitioner conceded
 15 that Ground 5 was unexhausted in state court. *Id.* at 17. The question, therefore, is whether
 16 petitioner exhausted this claim during his last state habeas proceedings.

17 Petitioner raised a claim very similar to Ground 5 in the habeas petition he filed in the
 18 state district court on April 10, 2000. *See Exhibit 251*, pp. 12-13.

19 On the appeal from the denial of his state habeas petition, the organization of
 20 petitioner’s opening brief suggested that petitioner raised only issues of claimed ineffective
 21 assistance of counsel. *See Exhibit 312*, p. 11.² However, in the body of the brief, petitioner
 22 appeared to raise the claim regarding Dr. Brooks’ qualifications and the reliability of her testimony
 23 and conclusions. *See id.* at 16-18. While not artfully accomplished, the Court does find that
 24 petitioner did exhaust Ground 5 on the appeal from the denial of his last state habeas petition.

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 26 ² The pages of the opening brief are not numbered. The Court’s citations of that document
 consider the page numbering to start with the caption page as page 1.

1 C. Ground 10

2 In Ground 10, petitioner claims:

3 Major's conviction and sentence are invalid under the federal constitutional
4 guarantees of due process, equal protection, trial before an impartial jury and a
5 reliable sentence because the reasonable doubt instruction given during the
trial improperly minimized the State's burden of proof. U.S. Const. Amends.
V, VI, & VIII.

6 Amended Petition, p. 22. Petitioner conceded in his amended petition that, as of March 17, 2000,
7 Ground 10 was unexhausted in state court.

8 In his April 10, 2000 state habeas petition, petitioner raised a claim very similar to
9 Ground 10. *See* Exhibit 251, pp. 15-16. In his opening brief on appeal, petitioner raised this claim.
10 *See* Exhibit 312, p. 20, lines 7-11. Ground 10 is exhausted.

11 D. Ground 11

12 In Ground 11, petitioner claims:

13 Major's conviction and sentence are invalid under the federal constitutional
14 guarantees of due process, equal protection, trial before an impartial jury and a
15 reliable sentence because the premeditation and deliberation and malice
instructions given during the trial improperly minimized the State's burden of
proof. U.S. Const. Amends. V, VI, & VIII.

16 Amended Petition, p. 23. Petitioner conceded in his amended petition that, as of March 17, 2000,
17 Ground 11 was unexhausted in state court.

18 In his April 10, 2000 state habeas petition, petitioner raised a claim very similar to
19 Ground 11. *See* Exhibit 251, pp. 16-17. In his opening brief of appeal, petitioner raised this claim.
20 *See* Exhibit 312, p. 20, lines 12-16. Ground 11 is exhausted.

21 E. Ground 12

22 In Ground 12, petitioner claims:

23 Petitioner's conviction is invalid under the federal constitutional guarantees of
24 due process, equal protection, trial before an impartial jury and a reliable
25 sentence due to the substantial and injurious effect of a consistent pattern of
prosecutorial misconduct and overreaching which distorted the fact finding
26 process and rendered the trial and sentencing hearing fundamentally unfair.
U.S. Const. Amends. V, VI, & XIV.

1 Amended Petition, p. 26. Petitioner conceded in his amended petition that, as of March 17, 2000,
2 Ground 12 was unexhausted in state court.

3 In his April 10, 2000 state habeas petition, petitioner raised a claim very similar to
4 Ground 12. *See* Exhibit 251, pp. 17-18. In his opening brief of appeal, petitioner raised this claim.
5 *See* Exhibit 312, pp. 20-21. Ground 12 is exhausted.

6 F. Ground 13

7 In Ground 13, petitioner claims:

8 Major's conviction is invalid under the federal constitutional guarantees of
9 due process and a fair trial due to the unfairly prejudicial atmosphere in which
his trial took place. U.S. Const. Amends. V, VI, & XIV.

10 Amended Petition, p. 27. Petitioner conceded in his amended petition that, as of March 17, 2000,
11 Ground 13 was unexhausted in state court.

12 In his April 10, 2000 state habeas petition, petitioner raised a claim very similar to
13 Ground 13. *See* Exhibit 251, pp. 17-18. In his opening brief of appeal, petitioner raised this claim.
14 *See* Exhibit 312, p. 21, lines 4-9. Ground 13 is exhausted.

15 G. Ground 14

16 In Ground 14, petitioner claims:

17 Petitioner's conviction is invalid under the federal constitutional guarantees of
18 due process right to counsel and freedom from self-incrimination because law
19 enforcement officials obtained various statements from petitioner in the
absence of a voluntary, knowing and intelligent waiver of his constitutional
rights. U.S. Const. Amends. V, VI, & XIV.

20 Amended Petition, p. 28. Petitioner conceded in his amended petition that, as of March 17, 2000,
21 Ground 14 was unexhausted in state court.

22 In his April 10, 2000 state habeas petition, petitioner raised a claim very similar to
23 Ground 14. *See* Exhibit 251, p. 19. In his opening brief of appeal, petitioner raised this claim.
24 *See* Exhibit 312, p. 21, lines 10-19. Ground 14 is exhausted.

1 H. Ground 16

2 Because Ground 16 is moot, and will be dismissed for that reason (*see* discussion,
3 *supra*, p. 4), the Court need not reach respondents' argument that Ground 16 is unexhausted.

4 I. Grounds 17(b), (d), (g), (h), (I), (j), (l), and (n)

5 In Ground 17, petitioner claims that his constitutional rights were denied because he
6 received ineffective assistance from his trial counsel. Ground 17 is divided into 18 parts, designated
7 Grounds 17(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), and (r).
8 Respondents argue that Grounds 17(b), (d), (g), (h), (i), (j), (l), and (n) are unexhausted in state court.

9 The crux of respondents' argument is that, although petitioner presented essentially
10 the same claims to the state district court in his state habeas petition, petitioner did not fully reiterate
11 the claims in his opening brief before the Nevada Supreme Court. Respondents argue that, because
12 certain facts were left out in the statement of the claims on appeal, the claims, as fully set out now in
13 this case, are not exhausted.

14 The Court need not reach respondents' argument regarding Ground 17(n), because
15 that claim is moot (*see* discussion, *supra*, p. 4), and will be dismissed for that reason.

16 The Court finds Grounds 17(b), (d), (g), (h), (i), (j), and (l) to be exhausted.
17 Petitioner fairly presented those claims to the Nevada Supreme Court. The factual details in the
18 amended petition in this case (and in the state habeas petition (Exhibit 251)), but not in petitioner's
19 opening brief before the Nevada Supreme Court, do not fundamentally alter the claims. *See Lopez v.*
20 *Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007).

21 Procedural Default

22 A. Procedural Default Standards

23 "Procedural default" refers to the situation where a petitioner in fact presented a claim
24 to the state courts but the state courts disposed of the claim on procedural grounds, instead of on the
25 merits. A federal court will not review a claim for habeas corpus relief if the decision of the state
26 court regarding that claim rested on a state law ground that is independent of the federal question and

1 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

2 Even if a state court decision reaches the merits of a claim, basing its ruling primarily
3 on federal law, federal habeas corpus review is procedurally barred “as long as the state court
4 explicitly invokes a state procedural bar rule as a separate basis for decision.” *Harris v. Reed*, 489
5 U.S. 255, 264 n.10 (1989); *see also Coleman*, 501 U.S. at 736; *Loveland v. Hatcher*, 231 F.3d 640,
6 643-44 (9th Cir. 2000).

7 The *Coleman* Court stated the effect of a procedural default, as follows:

8 In all cases in which a state prisoner has defaulted his federal claims in
9 state court pursuant to an independent and adequate state procedural
10 rule, federal habeas review of the claims is barred unless the prisoner
11 can demonstrate cause for the default and actual prejudice as a result of
the alleged violation of federal law, or demonstrate that failure to
consider the claims will result in a fundamental miscarriage of justice.

12 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

13 To demonstrate cause for a procedural default, the petitioner must be able to
14 “show that some objective factor external to the defense impeded” his efforts to comply with the
15 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must
16 have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497
17 (1991).

18 With respect to the prejudice prong of cause and prejudice, the petitioner bears “the
19 burden of showing not merely that the errors [complained of] constituted a possibility of prejudice,
20 but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with
21 errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United*
22 *States v. Frady*, 456 U.S. 152, 170 (1982)). If the petitioner fails to show cause, the court need not
23 consider whether the petitioner suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43
24 (1982); *Roberts v. Arave*, 847 F.2d 528, 530 n.3 (9th Cir. 1988).

25 B. Ground 5

26 On the appeal from the denial of petitioner’s last state habeas petition, the Nevada

1 Supreme Court ruled that petitioner's "claims regarding the State's expert witness's qualifications
2 and methods ... were waived by appellant's failure to present them to the trial court and/or raise them
3 in his direct appeal." Order of Affirmance, Exhibit 318, pp. 2-3, footnote 3. The court cited NRS
4 34.810(1)(b) as the source of the authority for the procedural default. *See id.* Ground 5 was
5 procedurally defaulted in state court.

6 C. Ground 10

7 On the appeal from the denial of petitioner's last state habeas petition, the Nevada
8 Supreme Court ruled that petitioner's "claims regarding ... erroneous and/or unfair jury instructions
9 ... were waived by appellant's failure to present them to the trial court and/or raise them in his
10 direct appeal." Order of Affirmance, Exhibit 318, pp. 2-3, footnote 3 (citing NRS 34.810(1)(b)).
11 Ground 10 was procedurally defaulted in state court.

12 D. Ground 11

13 On the appeal from the denial of petitioner's last state habeas petition, the Nevada
14 Supreme Court ruled that petitioner's "claims regarding ... erroneous and/or unfair jury instructions
15 ... were waived by appellant's failure to present them to the trial court and/or raise them in his
16 direct appeal." Order of Affirmance, Exhibit 318, pp. 2-3, footnote 3 (citing NRS 34.810(1)(b)).
17 Ground 11 was procedurally defaulted in state court.

18 E. Ground 12

19 On the appeal from the denial of petitioner's last state habeas petition, the Nevada
20 Supreme Court ruled that petitioner's "claims regarding ... prosecutorial misconduct ... were waived
21 by appellant's failure to present them to the trial court and/or raise them in his direct appeal." Order
22 of Affirmance, Exhibit 318, pp. 2-3, footnote 3 (citing NRS 34.810(1)(b)). Ground 12 was
23 procedurally defaulted in state court.

24 F. Ground 14

25 On the appeal from the denial of petitioner's last state habeas petition, the Nevada
26 Supreme Court ruled that petitioner's "claims regarding ... coerced and/or involuntary statements to

1 investigators were waived by appellant's failure to present them to the trial court and/or raise them in
2 his direct appeal." Order of Affirmance, Exhibit 318, pp. 2-3, footnote 3 (citing NRS 34.810(1)(b)).
3 Ground 14 was procedurally defaulted in state court.

4 G. Ground 16

5 Because Ground 16 is moot, and will be dismissed for that reason (*see* discussion,
6 *supra*, p. 4), the Court need not reach respondents' argument that Ground 16 is procedurally
7 defaulted.

8 H. Adequacy of Procedural Bar

9 "In order to constitute adequate and independent grounds sufficient to support a
10 finding of procedural default, a state rule must be clear, consistently applied, and well-established at
11 the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994).

12 In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003), the court of appeals
13 announced a burden-shifting test to be applied in analyzing the adequacy of a state procedural bar.
14 Under *Bennett*, the State carries the initial burden of adequately pleading "the existence of an
15 independent and adequate state procedural ground as an affirmative defense." *Bennett*, 322 F.3d at
16 586. The burden then shifts to the petitioner "to place that defense in issue," which the petitioner
17 may do "by asserting specific factual allegations that demonstrate the inadequacy of the state
18 procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.*
19 If the petitioner meets this burden, "the ultimate burden" of proving the adequacy of the state bar
20 rests with the State, which must demonstrate "that the state procedural rule has been regularly and
21 consistently applied in habeas actions." *Id.*

22 In their motion to dismiss, respondents assert the existence of an adequate and
23 independent procedural bar. In his response, petitioner argues that NRS 34.810(2) is not an adequate
24 procedural bar; he argues that at the time of the default in this case – in 1996, according to petitioner
25 – the Nevada courts did not consistently apply NRS 34.810(2), but, rather, at times overlooked that
26 provision. *See* Opposition to Motion to Dismiss, pp. 6-8. Petitioner makes this argument by

1 pointing to previous rulings by federal and state courts regarding the adequacy of
2 NRS 34.810(2). In reply, respondents likewise point to previous rulings regarding the adequacy of
3 NRS 34.810(2), asserting that those rulings demonstrate that NRS 34.810(2) has been regularly and
4 consistently applied.

5 Contrary to petitioner's argument, respondents show that the Ninth Circuit Court of
6 Appeals has held that, at least in non-capital cases, NRS 34.810(2) is consistently applied by the
7 Nevada courts, and is adequate to function as a procedural bar. *See Bargas v. Burns*, 179 F.3d 1207,
8 1210-12 (9th Cir. 1999) ("Thus, Nevada follows a strict rule: A petitioner must raise all claims in his
9 first habeas petition in order to avoid the penalty of procedural default."), *cert. denied*, 529 U.S.
10 1073 (2000); *see also Petrocelli v. Angelone*, 248 F.3d 877, 886 (9th Cir. 2001) (distinguishing
11 capital and non-capital cases); *Valerio v. Crawford*, 306 F.3d 742, 776-77 (9th Cir. 2002) (*en banc*)
12 (same); *Vang v. Nevada*, 329 F.3d 1069, 1074 n. 3 (9th Cir. 2003) (same).

13 The Court finds that respondents have met their burden, and have adequately refuted
14 petitioner's claim that NRS 34.810(2) is inadequate to support a procedural default. On this record,
15 the Court must follow the Ninth Circuit precedent cited above, and rule that, at the relevant time,
16 NRS 34.810(2)(b) was regularly and consistently applied.

17 The Nevada Supreme Court's ruling that Grounds 5, 10, 11, 12, and 14 were
18 procedurally barred under NRS 34.810(2)(b) was an independent and adequate ground, such as to
19 support a procedural default.

20 I. Cause and Prejudice

21 Petitioner also asserts that there was cause and prejudice with respect to the
22 procedural default of Grounds 5, 10, 11, 12, and 14, such that this Court should reach the merits of
23 those claims. *See Opposition to Motion to Dismiss*, pp. 8-9. Specifically, petitioner claims that
24 ineffective assistance of his appellate counsel, in not raising Grounds 5, 10, 11, 12, and 14 on his
25 direct appeal, was the cause of the procedural default. *Id.*

26 Ineffective assistance of counsel may satisfy the cause requirement to overcome a

1 procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, for ineffective
2 assistance of counsel to satisfy the cause requirement, the independent claim of ineffective assistance
3 of counsel, itself, must first be presented to the state courts. *Id.* at 488-89. In addition, the
4 independent ineffective assistance of counsel claim cannot serve as cause if that claim is
5 procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). It appears that petitioner's
6 claims of ineffective assistance of his appellate counsel have been exhausted, and not procedurally
7 defaulted, in state court. It is, therefore, at least possible that petitioner may be able to show cause
8 and prejudice stemming from his appellate counsel's performance.

9 However, the questions whether petitioner's appellate counsel was ineffective, and
10 whether petitioner was prejudiced by errors of his appellate counsel, will involve an evaluation of the
11 merits of Grounds 5, 10, 11, 12, and 14. Because the cause-and-prejudice issues and the merits are
12 so closely related, the Court will not address the issue of cause and prejudice regarding the
13 procedural default of Grounds 5, 10, 11, 12, and 14, until the amended petition is fully briefed.

14 The Court will set a schedule for the respondents to file an answer, *responding to all*
15 *the remaining claims in the amended habeas petition on their merits*. In addition, with respect to
16 Grounds 5, 10, 11, 12, and 14, respondents may reassert their procedural default defense, addressing
17 the question whether ineffective assistance of petitioner's appellate counsel might be a source of
18 cause and prejudice with respect to the procedural default of those claims, such that the Court should
19 reach their merits. Petitioner will be granted an opportunity to reply.

20 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (docket #66)
21 is **GRANTED IN PART AND DENIED IN PART**. Grounds 16 and 17(n) are **DISMISSED**.
22 In all other respects, the motion to dismiss is denied. With respect to Grounds 5, 10, 11, 12, and 14,
23 the denial of the motion to dismiss is without prejudice to respondents reasserting the procedural
24 default defense in their answer.

25 **IT IS FURTHER ORDERED** that respondents shall have until and including
26 **July 11, 2008**, to file and serve an answer, responding to all the remaining claims in the amended

1 habeas petition (docket #14). After respondents file their answer, petitioner shall have 45 days to file
2 and serve a reply.

3 Dated this 15th day of April, 2008.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE